



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

RESPONSE TO PROTEST

allegations. Relying upon the record and witness testimony, the court and the jury found each of the Protestor's allegations to be without merit and upheld the patent. Indifferent to the findings of fact by the jury, the Protestor now raises these arguments again in an effort to divert the Examiner from the substantive merits of this reissue application. The Protestor's inaccurate account of the history of the '448 patent should be disregarded as irrelevant to this reissue application and should not be relied upon by the Examiner.

II. The Reissue Claims Have Full Written Description Support

A. The Term "Central Distribution Box" Is Fully Supported By The Specification

The term "Central Distribution Box" is found in Col. 5, line 15 through 18 of the specification. This text is reproduced below:

For example, if the in-room amenity were a television that offered movies, a central distribution box could be located in the hotel establishment. The store-and-forward switch 48 could access this central distribution box through an extension on the PBX 12 and route the appropriate information therethrough. In this manner, the billing information, etc., is stored at the store-and-forward switch 48 through use of the computer 50 and then the in-room amenity 54 activated.

(Emphasis added).

The functionality of the central distribution box is described in the specification as providing for the offering of movies through a television as the in-room amenity. The central distribution box, located in the hotel establishment, is accessed by a store-and-forward switch through the PBX 12. Accordingly, it is understood that the central distribution box is connected directly to the amenity without a switched telephone network therebetween.

Commonly referred to in the industry, the "central distribution box" or "central distribution point" (also sometimes referred to as a "head end") is a well known component in a pay-per-view system. It is the source of the signal for playing movies on televisions. Therefore, the foregoing descriptions in the patent of the central

distribution box are sufficient, and extensive additional descriptions of what constitutes a central distribution box, are not necessary. As the MPEP states:

If elements of an invention are well known in the art, *the applicant does not have to provide a disclosure that describes those elements*. In such a case the elements will be construed as encompassing any and every art recognized hardware or combination of hardware and software technique for implementing the defined requisite functionalities.

MPEP 2106 II(c) (emphasis added).

For the Examiner's benefit, it is noted that the term central distribution box (i.e., central distribution point) is a term so well known in the art that is referenced in the PTO's classification system. For instance, in the class definition of Class 725, subclass 2, the PTO states:

This subclass includes means or steps for electronically retrieving locally stored data for further *processing at a central distribution point, such as a headend*.

<http://www.uspto.gov/go/classification/uspc725/defs725.htm> (Appendix A)

Because those who practice the art and the PTO recognize that a central distribution point or box is a common industry term, there is no need for additional definition of the term.

B. The Written Description Requirement Is Met With Regard To "Central Distribution Box" As Recited In The Reissue Claims

The Federal Circuit held that '448 patent specification failed to adequately describe the term "central distribution computer" because a satisfactory description of the central distribution computer must meet the following:

Based on the claim language, a satisfactory description of the central distribution computer must comport with two conditions: (1) the central distribution computer must connect directly to the amenity device, and (2) it cannot connect to the amenity device through the switched telephone system.

(Court Opinion, page 12).

The Court's ruling is derived from the language of the claims, e.g., Claim 1:

“...a central distribution computer located at said facility and connected without said switched network telephone system directly to said amenity device for facilitating the offer of a pay per view offering responsive to said billing computer validation.”

The amended claims in the reissue application replace “central distribution computer” with the “central distribution box,” the result being that the description in the specification now meets these claim requirements.

Referring to the specification (column 5, lines 15-18), the central distribution box is “located in the hotel establishment” and is used to distribute movies to the “in-room amenity” (through a television). The central distribution box is accessed “through an extension on the PBX 12” inside the hotel establishment. Accordingly, the central distribution box connects directly to the in-room amenity without connecting back to the in-room amenity through the switched network telephone system.

Furthermore, it is understood by one of ordinary skill in this industry that, as contrasted with the previously claimed “central distribution computer,” a central distribution box (i.e., a “head end”) located at the establishment is a device that is specifically designed to connect directly with the amenity device (e.g., to the television) to deliver the signal for a pay per view movie. There could never be a switched telephone network system in between.

With the claims as now amended in this reissue application, the Federal Circuit’s opinion is moot because these new claims meet the written description requirement, and, respectfully, they should be allowed by the Examiner.

III. The Reissue Claims Do Not Seek To Broaden The Scope Of The Claims.

A. Substituting A “Central Distribution Box” For A “Central Distribution Computer” Does Not Broaden The Claim

The Protestor argues that because the word “computer” was replaced with “box” the claims were broadened since the word “box” is a broader term than the word “computer.” Protestors argument is without merit because the opposite is true—the central distribution box is in fact a narrower term. A central distribution “box” contains not only a computer, but also an interface to the television amenity, making it narrower than just a central distribution “computer.”

1. It Is Well Known In The Pay-Per-View Art That A "Central Distribution Box" Contains A Computer Or Processor

As explained fully above, those skilled in the art would recognize that a central distribution box equates with the term "headend" or "central distribution point," and is a commonly recognized term in the art. Referring again to the class definition of Class 725, subclass 2, the PTO states:

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being narrower.

This subclass includes means or steps for electronically retrieving locally stored data for further *processing at a central distribution point*, such as a *headend*.

<http://www.uspto.gov/go/classification/uspc725/defs725.htm> (Appendix A)

The term "head end" is also defined in Newton's Telecom Dictionary. According to this definition, a head end is "a central control device required with some LAN/MAN systems to provide such centralized functions as remodulation, re-timing, message accountability, contention control, diagnostic control, and access." (See Appendix B). Functions of the head end (e.g., automatic message accountability), must necessarily be performed by a computer.

Additionally, a typical definition of "head end" found on the Internet is the following:

Head end - Central distribution point for a CATV system. Video signals are received here from satellite (either co-located or remotod), frequency converted to the appropriate channels combined with locally originated signals, and rebroadcast onto the HFC plant.

(See Appendix C. See also Appendix D and E for additional definitions).

Thus, it is clear, both from the PTO web site and the usage within the art that a central distribution box, or head end, is as well known device in the art. Further support that a head end inherently contains a computer is evident from the PTO's classification system. In the class definition of Class 725, subclass 4, the PTO states:

Data stored at intermediate point (i.e., at location between headend or server and receiver): This subclass is indented under subclass 1. Subject matter comprising means or steps for recording or storing use-related

information at an intermediate system location for subsequent billing purposes.

<http://www.uspto.gov/go/classification/uspc725/defs725.htm> (emphasis added) (See Appendix A).

In summary, the term “central distribution box” or “central distribution point,” also referred to as a “head end,” is a well known device that, in pay-per-view systems, contains a computer or processor which distributes the signal.

2. A “Central Distribution Box” Containing A Computer Or Processor is Not Broader Than The Previously Claimed “Central Distribution Computer”

Replacing the term “central distribution computer” with the term “central distribution box” does not constitute a broadening amendment; it renders the claim more narrow.

For purposes of this discussion, please note the relevant portions of amended claim 1:

Apparatus for processing billing information through a switched network telephone system for offering *pay per view amenities* to a user at an amenity device within a facility, the apparatus comprising: . . .

a central distribution box [computer] located at said facility and connected without said switched network telephone system directly to said amenity device for facilitating the offer of a pay per view offering responsive to said billing computer validation.

In claim 1, the term “central distribution computer” was amended to be “central distribution box.” As discussed above, this is a narrowing amendment because a central distribution box in-pay-per-view systems must contain, in addition to other elements, a central distribution computer.¹ In other words, it is well known in the art that a central distribution box contains a central distribution computer plus other

¹ The Protestor has argued that a central distribution box *may* contain a computer and has used quotations from MessagePhone's expert witness to support their contention. Such quotations were taken out of context. The quotations used by the Protestor were in not in the context of pay-per-view systems, where a central distribution box *must* contain a computer to determine where to distribute the signals. The quotations submitted by the Protestor refers to a situation where all units would receive the same signal, which is not the case in pay-per-view systems. The Protestor attempts to use this definition in the

interface components (e.g., for frequency conversion and for combination with locally originated signals). See Appendix C. Thus, by changing the term “central distribution computer” to the term “central distribution box,” the Applicant has narrowed the claim not broadened it. While a central distribution computer can perform many functions, the functionality of a central distribution box is to process and deliver video signals to the television.

B. The Terms “Private” And “Public” Narrows Claim 21

The Protestor also claims that by adding the limitations “private” and “public” to claim 21, claim 21 was broadened. A red-lined comparison of claim 21 to the original claim 1 is shown below:

21. [From Claim 1] Apparatus for processing billing information through a private switched network telephone system for offering pay per view amenities to a user at an amenity device within a facility, the apparatus comprising:

- a telephone at said facility and connected to said private switched network telephone system by a telephone line, said telephone for transmitting and receiving information on said line;

- a line powered card reader connected to said telephone for reading credit cards and extracting billing information therefrom;

- a power supply connected to said line and said card reader for converting power of said line to a power supply voltage with sufficient current to power said card reader;

- a processor connected to said card reader and said telephone for controlling said card reader to extract said billing information from said credit card and for transmitting said extracted billing information on said line;

- a billing computer connected to said telephone system for receiving and validating said transmitted billing information; and

- a central distribution [computer] box located at said facility and connected without [said] a public switched network telephone system directly to said amenity device for facilitating the offer of a pay per view offering responsive to said billing computer validation.

It is “black letter” patent law that adding adjectives (i.e., “public” and “private” to the term “switched network”) to the claim results in the narrowing of the claim. The Protestor argues this claim is broadened because, according to the Protestor, the scope

court case by referring to the uncorrected deposition transcript, which is out of the context of a pay per view amenity. These arguments were rejected by the trial court.

of this claim has been enlarged with the addition of the words public and private. Once again, the Protestor's argument is contrary to the MPEP.

As discussed above, a broadening reissue claim is a claim which enlarges the scope of the claims of the patent. As the MPEP states:

A claim in the reissue which includes subject matter not covered by the patent claims enlarges the scope of the patent claims. For example, if any amended or newly added claim in the reissue contains within its scope any conceivable product or process which would not have infringed the patent, then that reissue claim would be broader than the patent claims. . . . A claim which reads on something which the original claims do not is a broadened claim. A claim would be considered a broadening claim if the patent owner would be able to sue any party for infringement who previously could not have been sued for infringement.

MPEP 1412.03 (emphasis added)

It is called to the Examiner's attention that a broadening claim is one that contains subject matter not covered in the patent claims (i.e., the entire set of patent claims). The concept of "public networks" was clearly covered in the original claims 18 and 20. Original claim 18 is reproduced below:

18. A method for user access to pay per view offerings at an amenity location within a facility, the method comprising:
providing a central distribution computer within said facility, said central distribution computer being connected without a public switched network to said amenity location for offering a pay per view offering;
providing a store and forward switch connected to said central distribution computer and providing a telephone connected to said store and forward switch, said store and forward switch receiving and storing from said telephone user billing information and pay per view offering identification information;
responsive to said receiving and storing, said store and forward switch instructing said central distribution computer to offer a pay per view offering selected by said telephone user at said amenity location.

Original claim 20 is also reproduced below:

20. The method of claim 18 further comprising: providing a central billing service connected through a public switched network, for validating said billing information responsive to receipt thereof from said store and forward switch.

The concept of private networks is also within the scope of original claims 18 and 20. Claim 18 is a method of accessing at "at a facility," and it is clear that claim 18 refers to a private network. For instance, the fact that claim 18 was referring to a private network is apparent from claim 20, which recites alternatively that the billing service could be connected through a public switched network.

Finally, the Applicant wishes to draw the Examiner's attention to the MPEP 1412.03, page 1400-16 where it states that the test for determining whether a claim has been broadened is whether the patent owner would be able to sue any party for infringement who previously could not have been sued. By adding the words "public" and "private" to claim 1, the Applicant is not able to sue anyone under the amended claim 21 that it could not have sued under the original claim 1. Thus, claim 21 could not possibly be a broadening claim.

1. The Claim 21 Limitation "Private Switched Network Telephone System" Has Adequate Written Description Support

The Protestor argued that the Applicant added the term "private" to "switched network telephone system," in Claim 21 without supporting this word with an adequate written description. Notwithstanding the general descriptions of private and public network in the patent and claims, the Applicant respectfully contends that the word "private" does not need a detailed description because the term "private" and "private network telephone system" are well known terms in the art. Turning again to the MPEP:

If elements of an invention are well known in the art, the applicant does not have to provide a disclosure that describes those elements. In such a case the elements will be construed as encompassing any and every art recognized hardware or combination of hardware and software technique for implementing the defined requisite functionalities.

MPEP 2106 II(c) (emphasis added).

The Protestor also stated: "Nowhere in the specification is there any suggestion that switched network telephone system could be a private telephone system." (last sentence page 25). In response, the Applicant asks the Examiner to look col. 3, lines 6 through 24 of the Specification, which is reproduced below:

Referring now to FIG. 1, there is illustrated a system diagram for the access system of the present invention. An access phone 10 is provided that is interconnected with an extension on a PBX 12. Although only one access phone 10 is illustrated, it should be understood that a plurality of access phones 10 are provided in a given establishment, such as a hotel. The access phone 10 can be interfaced with a FAX machine 12, a personal computer 14, or a television 16 such that information can be transmitted therefrom through the access phone 10. The PBX 12 has a plurality of trunk lines 18 connected to a store-and-forward switch 20.

The Applicant also wishes to call the Examiner's attention to reference number 12 in Figs. 1 and 2; and step 94, 98, of Fig. 4. Reference 12 is a PBX, which as the Examiner is aware is a well known term in the art and stands for a "Private Branch Exchange." According to Newton's Telecomm Dictionary a Private Branch Exchange is a "private telephone switching system, usually located on a customer's premises with an attendant console. Thus, the specification contains numerous references that one skilled in the art would easily recognize as a private switching system.

IV. The Reissue Claims Are Not Taught By The Cited Art

Previously, the present Examiner reviewed the claims of the original application in light of the prior art. After this careful consideration, the claims of the original application were allowed. Here, the reissue claims narrow the scope of the claims from the original application. The Protestor has found no reference which teaches the physical combination and method as set forth in the reissue independent claims. Nor does any of the "new" art cited by the Protestor teach or suggest the use of this combination. Although the Protestor introduces new references, these references are merely cumulative and do nothing to affect the allowability of the reissue claims. Additionally, these references were introduced during litigation and at trial, and a judge and jury found these references to have no effect on the validity of the patent. Thus, the Protestor has made no argument which would change the Examiner's previous reasons for allowance.

A. The Protestor Not Met the Burden Established for Obviousness

The Protestor argues that he has found a prior art example of each claim element and when by combining multiple patents he has reconstructed the claimed

invention. By doing so, the Protestor concedes that the none of the cited art anticipates the reissue claims. As the Examiner is well aware, the fact that an invention is a combination of old elements is not a barrier to patentability. For instance, as the Federal Circuit has emphasized on numerous occasions:

The '315 patent specifically stated that it disclosed and claimed a combination of features previously used in two separate devices. That fact alone is not fatal to patentability. The claimed invention must be considered as a whole, and the question is whether there is something in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination.

Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co., 221 USPQ 481, 488 (Fed. Cir. 1984)(emphasis added).

The Protestor has done nothing more but combine the teaches of prior art to produce the claimed invention. The Examiner is aware that this is an impermissible use of hindsight. Again, the Federal Circuit has held:

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under section 103, teachings of references can be combined only if there is some suggestion or incentive to do so." (quoting *ACS Hosp. Systems, Inc. v. Montefiore Hosp.*, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984)). . . . The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.

In re Fritch, 23 USPQ 2d 1780, 1783–84 (Fed. Cir. 1992)(emphasis added).

Thus, the Protestor has improperly combined the cited art without providing a teaching supporting the combination. Section 2142 of the MPEP also provides:

...the examiner must step backward in time and into the shoes worn by the hypothetical person of ordinary skill in the art' when the invention was unknown and just before it was made....The examiner must put aside knowledge of the applicant's disclosure, refrain from using hindsight, and consider the subject matter claimed as a whole.

Here, none of the cited art teaches, or even suggests, the desirability of the combination since no reference teaches the specific arrangement and location of the

claimed elements. Thus, it is clear that none of the cited art provides any incentive or motivation supporting the desirability of the combination. Therefore, there is simply no basis in the art for combining the references to support a 35 U.S.C. 103 rejection.

In this context, the MPEP further provides at section 2143.01:

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination.

In the above context, the courts have repeatedly held that obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination. In the present case it is clear that the Protestor's combinations arise solely from hindsight based on the invention without any showing, suggestion, incentive or motivation in the references for the combination as applied to the reissue claims. Therefore, for this mutually exclusive reason, the burden of factually supporting a prima facie case of obviousness has clearly not been met. It is respectfully submitted that Examiner should reject the Protestor's impermissible combinations of prior art.

B. Fenwick Does Not Anticipate the Reissue Claims

The Protestor cited U.S. Patent No. 4,947,244 to Fenwick et al. ("Fenwick") for teaching a video distribution system which is located on-site at a hotel. The Protestor tried to invalidate the original claim set by citing Fenwick at trial. That argument failed at trial. It now appears that the Protester is merely attempting to resurrect the same argument.

Fenwick does not anticipate the reissued claims. For instance, reissue claim 1 recites:

1. Apparatus for processing billing information through a switched network telephone system for offering pay per view amenities to a user at an amenity device within a facility, the apparatus comprising:
 - a telephone at said facility and connected to said switched network telephone system by a telephone line, said telephone for transmitting and receiving information on said line;
 - a line powered card reader connected to said telephone for reading credit cards and extracting billing information therefrom;

a power supply connected to said line and said card reader for converting power of said line to a power supply voltage with sufficient current to power said card reader;

a processor connected to said card reader and said telephone for controlling said card reader to extract said billing information from said credit card and for transmitting said extracted billing information on said line;

a billing computer connected to said telephone system for receiving and validating said transmitted billing information; and

a central distribution box located at said facility and connected without said switched network telephone system directly to said amenity device for facilitating the offer of a pay per view offering responsive to said billing computer validation.

The invention disclosed in Fenwick does not use a telephone nor a card reader as required in claim 1. Fenwick does not disclose a store and forward switch as required in other claims. Thus, Fenwick does not anticipate Claim 1 nor any other of the reissue claims. While the Fenwick can deliver a pay-per-view movie to a specific room monitor, and contains a description of what may be required of a central distribution box, it does not disclose or suggest the combination of elements recited by the reissue claims.

C. Theurer Does Not Anticipate the Reissue Claims

The Protestor cited U.S. Patent No. 4,008,369 to Theurer et. al. ("Theurer") for teaching a video distribution system which is located on-site at a hotel. It appears that the Protestor believes Theurer anticipates claims 18 and 23. Claim 23 recites:

A method of user access to movies at an amenity location, the method comprising:

providing a store-and-forward switch (SFS) connected to said amenity location for facilitating the offer of a movie;

providing a central billing computer connected to said SFS for validating said offer;

providing a telephone connected to said central billing computer through the SFS for user input to said central billing computer of user billing information and movie identification information, wherein said user input of billing and movie identification information through the telephone comprises:

reading user credit card information with a card reader connected to said telephone;

storing in said telephone said read credit card information;

offering selectable movie identification information to said user, said movie identification information being stored as selectable DTMF tones in said telephone; and

responsive to user selection of said offered movie identification information and said stored credit card information, connecting said telephone to said remote billing computer for validation;

responsive to said user input, validating in said central billing computer said user billing information; and responsive to said validation, said billing computer instructing said SFS to offer said movie at said amenity location.

Theurer does not teach a providing for a store and forward switch, providing a central billing computer, reading user credit card information with a card reader, and connecting to a remote billing computer for validation. Thus, Theurer does not anticipate claim 23.

Claim 18 recites:

18. A method for user access to pay per view offerings at an amenity location within a facility, the method comprising:

providing a central distribution box within said facility, said central distribution box being connected without a public switched network to said amenity location for offering a pay per view offering;

providing a store and forward switch connected to said central distribution box and providing a telephone connected to said store and forward switch, said store and forward switch receiving and storing from said telephone user billing information and pay per view offering identification information;

responsive to said receiving and storing, said store and forward switch instructing said central distribution box to offer a pay per view offering selected by said telephone user at said amenity location.

Contrary to the Protestor's assertions, Theurer does not teach a store-and-forward switch. The item that the Protestor calls a store-and-forward switch (item 25) in Theurer is actually a line between the PBX (3) and the mechanical control station (21). Each reference in the Protestor's analysis for item 25 turns out to be, on close examination, the PBX. As for the function of storing and forwarding billing information, there is no such device. What actually happens in Theurer is that a printer is triggered to print a paper ticket when a particular coded extension is manually dialed. Thus, Theurer also does not anticipate claim 18.

D. Monslow

U.S. Patent No. 4,890,320 to Monslow ("Monslow") discloses a television broadcast system for transmitting viewer-chosen programming at a viewer requested time over CATV lines. There is no credit card reader. The viewer chooses the programming using a telephone network for communication with customer service representatives at the terminals, who enter the selection and scheduling information into a scheduling computer. The movie is then transmitted over the PSTN or CATV system via a download to an addressable location. Monslow, in essence, is a public system. Monslow was identified during the initial application of U.S. Patent 5,323,448 and the Applicant identified significant differences between Monslow and the claimed invention. The differences remain in the reissue claims.

E. Cohen

U.S. Patent No. 4,949,187 to Cohen ("Cohen") discloses a video communications system that makes it possible for home viewers to download a movie in digital format from a large archive library, store the digital movie file locally, and view the movie at any convenient time. The system may limit access to particular movies and provides an accounting system that is used to bill downloads to the viewer's account as well as to post royalty payments to movie providers. Frequently viewed movies are quickly accessible via random access mass storage while infrequently viewed movies may be called up from a streaming tape archive. Cohen is similar to Monslow in that Cohen teaches a TV broadcast system. There is no credit card reader disclosed. Furthermore, the movie is transmitted over the PSTN or CATV system via a download to an addressable location. Cohen was identified during the initial application of U.S. Patent 5,323,448 and the Applicant identified significant differences between Cohen and the claimed invention. The differences remain in the reissue claims.

F. Gordon

U.S. Patent No. 4,763,191 to Gordon, ("Gordon") discloses a method and apparatus for providing a nationwide dial-a-view service in which a caller desiring a given viewing selection dials an "800" dial-a-view number for ordering that selection through the telephone networking arrangement. The arrangement includes local and toll

switching offices for accessing a centralized database system for providing routing instructions advantageously to network services equipment which acknowledges the request and processes the request to cable television distribution equipment. Billing records are kept at a database location and forwarded to local vendors along with customer identification information to enable the vendors to bill the appropriate customers. Gordon is similar to Monslow and Cohen in that it illustrates a TV broadcast system. Although this one is digital, it also contains no credit card reader. The movie is transmitted over the PSTN or CATV system via a download to an addressable location. Gordon was identified during the initial application of U.S. Patent 5,323,448 and the Applicant identified significant differences between Gordon and the claimed invention. The differences remain in the reissue claims.

G. Gehalo in view of Hodgson

The Protestor cited a British Patent No. GB 2184919 to Hodgson ("Hodgson") and U.S. Patent No. 4,595,983 to Gehalo ("Gehalo") to each teach a credit card reader powered by a payphone, where the reader connects to a metering device.

Even if Gordon had such a device installed in his system, he would only have been able to call a TV broadcast station. The differences that applied to Monslow and Cohen as described above would be applicable. Additionally, there is no mechanism taught that would create an automated link between telephone and the movie system such as the store-and-forward switch functions in the amended claims.


H. Gordon in view of Hodgson

The Protestor also cites that the combination of Hodgson and Gordon teach a credit card reader powered by a payphone, where the reader connects to a metering device. Even if Gordon had such a device installed in his system, he would only have been able to call a TV broadcast station. The differences that applied to Monslow and Cohen as described above would be applicable. Additionally, there is no mechanism taught that would create an automated link between telephone and the movie system such as the store-and-forward switch functions in the amended claims.

V. Conclusion

In summary, as amended, the reissue claims presented herein meet the written description requirement and define patentably over the cited references and, respectfully, they should be allowed by the Examiner.

Respectfully submitted,



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Appendix E